sheriff is bound *ex officio* to keep the jury when adjourned in a criminal cause, and it is not indispensably necessary that he be sworn, though it is generally done out of abundant caution. But, if it were admitted to be necessary, the court would be bound to presume that in fact the sheriff was sworn when the reoord does not show the contrary.

Where the record shows, as it does in this case, that at the beginning of the trial all the officers in charge of the jury were duly sworn, with the usual oath, to keep the jury during the trial, when in the absence of the court, it is to all intents and purposes a compliance with the "salutary and wise rule of practice" recognized and approved in the *Polky Barnes' Case, supra.*

The remaining assignment of error is to the refusal of the court to grant the prisoner a new trial, upon the ground that the verdict was contrary to the law and the evidence.

It is needless to say more of the evidence in detail than is to be found in the statement of the case already made. This was a fiendish murder, perhaps not surpassed in atrocity by any to be found in the annals of the Commonwealth. The defence the prisoner attempted to set up is conclusively shown to have been groundless; in fact, it is wholly contradicted by his own confessions. His conduct when the horrible deed was committed was that of a cool, self-contained man, and when asked the cause of his murderous act, simply replied that the woman was his wife. It is, therefore, plain that the jury could not have found, in accordance with the evidence, any other verdict than that of murder in the first degree.

The judgment of the County Court is affirmed. *Affirmed.*

ANDREWS v. ROANOKE BUILDING ASSOCIATION AND INVESTMENT CO.*

Supreme Court of Appeals: At Wytheville.

July 5, 1900.

Absent, *Riely,* J.

1. BUILDING ASSOCIATIONS — *Withdrawing member — Status — Act of limitation — Creditors — Stockholders.* A withdrawing member of a building association is not strictly speaking a creditor of the association. He can maintain no suit to recover the withdrawal value of his stock until a fund for such payment

* Reported by M. P. Burks, State Reporter.

has been provided, and until then the act of limitation does not begin to run against his demand. On the other hand, it is the duty of the association to provide such fund in accordance with charter and by-laws, and in default thereof the member may ask the appointment of a receiver, and, if need be, the winding up of the affairs of the association. Upon dissolution or insolvency outside creditors are entitled to be first paid, but withdrawing members whose notices of withdrawal have previously matured, are entitled to be paid before other stockholders receive anything.

Appeal from a decree of the Hustings Court of the city of Roanoke, pronounced May 21, 1899, in a suit in chancery, wherein the appellant was the complainant, and the appellee was the defendant.

Reversed.

The opinion states the case.

S. Hamilton Graves, for the appellant.

Cocke & Glasgow, for the appellees.

KEITH, P., delivered the opinion of the court.

Appellant instituted his suit in the Hustings Court of the city of Roanoke, on behalf of himself and all other creditors of the appellee, on the 30th of September, 1898, in which he states that he is the owner of ten shares of the stock of the company, upon which he had paid $500 in monthly installments of $10 each; that on the 20th of April, 1893, he gave notice of withdrawal to the company in due form; that under the by-laws, as they then existed, his notice did not become effective until the 20th of the ensuing May; that on the 15th day of April, 1893, at a meeting of the stockholders a change was made in the by-laws, the effect of which was to create a specific sum out of which withdrawals could be paid, which was limited to one-quarter of the amount paid into the association by the holders of instalment stock; that as of May 15, 1893, there were in existence 1,643 shares of instalment stock, monthly payments upon which would have produced something more than $400; that a number of said shares have been paid for and discharged, and the residue have all been converted into paid-up stock under the amendments of the by-laws of May 15, 1893, with the exception of twenty-two shares for which notice of withdrawal had been filed prior to May 15, 1893, and of which the shares of appellant constitute a part; that at a regular annual meeting of the stockholders held on the 15th of April, 1898, further amendments to the charter and changes in the by-laws were

proposed, and to that end a petition was presented to the judge of the Hustings Court, who entered an order as of the 19th of July, 1898, making the amendments asked for by virtue of which, whenever there happens to be as much as $500 in the treasury, the company notifies its stockholders and invites bids from them, the member offering the largest number of shares of stock to be cancelled for the least amount of money being accepted. It appears that there is not and never has been in the treasury of the company a fund applicable to the demands of the appellant; nor can there be in the future, since there are no longer any contributing members.

There are other averments of fact in the bill, the tendency of which is to strengthen the position of the appellant, but enough has been said to enable us properly to present our conclusions with respect to the law of the case.

The defendant demurred, and also filed a plea of the statute of limitations, setting forth that the cause of action did not arise within three or five years before the institution of the suit.

The position occupied by a withdrawing member of a Building Association is not very clearly defined by the authorities. It is said that he is not in all respects a creditor, for if that were so he might get judgment, issue an execution, acquire a lien upon real estate, and subject the personalty of the association to the prejudice of other creditors. He is no longer a member of the association so far as his right to participate in its management and control is concerned. He has no right of action against the company until a fund accrues out of which, in accordance with the charter and by-laws of the company, his debt should be paid; and as it appears from the averments of this bill that no such fund existed at any time in this case, it would seem that the right of action has never accrued to him as a creditor. If this be true, then it follows that his right to sue is not affected by the statute of limitations; but, if he is to be regarded only as a creditor, he is still out of court, because there was no right of action which entitled him to be in court. A member of such an association must upon withdrawal retain some relation to the company growing out of his membership other than that of creditor. It seems to us that by so much as he falls short of being clothed with the rights of a creditor by so much there must remain in him the residuum of his rights as a member; otherwise, as in the case at bar, he could not sue as a creditor because there was no fund out of which his debt could be paid, and the company by its dereliction of duty would deny all redress if he is not

permitted to seek a remedy in his capacity as stockholder. These propositions seem to be supported by authority.

In *Heinbokel* v. *Building Association*, 58 Minn. 340, 25 L. R. A. at page 216, the Supreme Court of Minnesota held that a member of an association who has brought himself within the rules by notice of withdrawal, cannot bring an action and take judgment against the association, when there is no money in the treasury legally applicable to the payment of his claim. To the same effect see *Englehardt* v. *Building Association*, 148 N. Y. 281.

In support of the position that a withdrawing member has not lost all of his right or interest as such in the association, there are numerous decisions and the authority of respectable text-writers.

"The right of members to presently withdraw deposits is practically limited to funds on hand. And the withdrawing member must show that there are funds for that purpose before he can enforce his demand, but it is an abuse of discretion for the directors to invest the entire funds in real estate so as to leave none applicable to the payment of withdrawing members, and thus defeat their rights. When notice of withdrawal is given the association, it should arrange the disposition of its receipts so as to meet its payments when due. While the right to withdraw is only grantable out of funds designated for that purpose, it is not intended that rightful lack of funds shall defeat the right as against the members. So, if the association is solvent and a member gives notice of withdrawal, and the notice had matured before the association is being wound up, he is entitled to be paid out of the assets, after outside creditors, in priority to those members who had not given notice, notwithstanding the fact that after he had given the notice, there were no funds for payment. The intention of the rule is to prevent the application of the funds to withdrawals to such an extent that its operations will be crippled ; and when it winds up, the reason of the rule does not apply, which readily defeats the application of the rule itself." Thompson on Building Associations, chap. 8, sec. 13.

It is said in Endlich on Building Associations, 2 ed., sec. 514, where the demands of all the members of such a corporation cannot be paid in full, there are ordinarily several classes advancing contradictory claims, "to-wit, members who have given notice of withdrawal, and the period of whose required notice may have expired before the proceedings to wind up were instituted, and members who have given no such notice. . . . . The tendency of the English courts, whilst recognizing that a withdrawing member is not a creditor

of the association in the ordinary sense of the word, has been to allow them a preference supposed to be based in the rules of the society over those who have given no withdrawal notice."

In *Sibun* v. *Pearce*, L. R. 44 Ch. Div. 354, Lindley, L. J., says of the position of one who has given notice of withdrawal but has not received payment, "that he is not an ordinary creditor is plain. He cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members, he is entitled to be paid the amount due to him before they can divide the assets. In that sense he is a creditor, though he cannot take part in the affairs of the society."

We have seen that a withdrawing member cannot sue until a sufficient fund is accumulated by the society to meet his demands, for until that event has happened he has no right of action, and it is well established that the statute of limitations does not begin to run until the right of action accrues. We have seen that it is the duty of the association to set apart a fund to meet its obligation to withdrawing members, and it conclusively appears from the bill under consideration that this duty in this instance has not been performed, and that the course taken by the stockholders precludes the possibility that appellant can obtain relief from that source.

The prayer for relief asks the appointment of a receiver, and if need be the winding up of the affairs of the company. This prayer, upon the facts presented by the bill, is sufficient to entitle the appellant to the relief which he seeks, if upon a hearing on the merits he is able to establish by proof the case which he has made in the pleadings.

The decree of the Hustings Court must be reversed, and the cause remanded to be further proceeded in, in accordance with the views expressed in this opinion. *Reversed.*

NOTE.—This case is of practical value in defining the somewhat uncertain relation borne toward a building fund association by a member who has given notice of withdrawal, under the usual by-law conferring the right to withdraw. The court holds not only that he cannot compete with outside creditors in the distribution of the assets, but that he cannot sue the association as a creditor, until there are funds in hand out of which his claim is payable. So long as he is not a complete creditor, with a present right to sue, he continues in some respect a shareholder, and as such has a *locus standi* in a court of equity, for the protection of such interests as he possesses in the association.